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No. 83-1849

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

EVERETT HODGES, III,

Petitioner,

VS.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, The Atchison, Topeka and Santa Fe Railway Company (hereinafter "Santa Fe"),[1] respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Tenth Circuit's opinion in this case.

[1] Respondent is a wholly owned subsidiary of Santa Fe Industries, Inc. which is a wholly owned subsidiary of Santa Fe Southern Pacific Corporation. Subsidiaries of respondent which are not wholly owned by it are as follows: Alameda Belt Line, The Oakland Terminal Railway, Oklahoma City Junction Railway Company, St. Joseph Terminal Railroad Company, and Sunset Railway Company.

STATEMENT OF THE CASE

Facts

Petitioner, Everett Hodges, was employed by respondent, Santa Fe, as a yardman in Oklahoma City, Oklahoma. Shortly after petitioner was hired, and before he had completed sixty days of service, *i.e.*, his period of probationary employment, Santa Fe discovered that his application for employment as a yardman and his entrance to service physical examination form had been falsely completed.[2] Petitioner was discharged on this account.

At all times during petitioner's employment with Santa Fe as a yardman, the United Transportation Union ("UTU") was certified as the collective bargaining representative of members of the yardmen's craft on the Santa Fe; throughout this period there remained in effect between Santa Fe and UTU collective bargaining agreements governing the terms and conditions of employment of persons performing service for Santa Fe as yardmen. These agreements explicitly provided a probationary period of employment for new Santa Fe yardmen. Together with similar clauses in collective bargaining agreements covering other railroad crafts, these provisions have routinely served as the basis for decisions to terminate the employment of probationary operating employees. Moreover, the National Railroad Adjustment Board and other Railway Labor Act arbitration boards have many times ruled that these clauses permit the termination of probationary railroad employees with or without cause.

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[2] Petitioner falsified his application by failing to disclose previous employment with Santa Fe and, during his entrance to service physical examination, concealed the fact that he had suffered a serious back injury.

Further, collective bargaining agreements in effect between Santa Fe and UTU concerning yardmen also specifically permit discharge of any yardman (even a non-probationary employee) who has falsified his employment application.

Neither petitioner nor anyone on his behalf ever took steps to initiate or progress a claim based on petitioner's termination to arbitration as provided for under the Railway Labor Act.

Proceedings Below

Two years after he was removed from service as a yardman, petitioner brought this action in Oklahoma state court against Santa Fe alleging wrongful discharge based on the terms of an unidentified employment contract with Santa Fe. Petitioner did not name any union representative as a defendant in the action, did not allege any wrongful conduct on the part of any union, and did not thereafter attempt to amend his pleading to implicate any union.

The essence of petitioner's complaint is that his discharge violated portions of federal contracts entered into by Santa Fe which prohibited employment discrimination against handicapped persons, and which petitioner alleged were incorporated in some employment contract in effect between him and Santa Fe.

Santa Fe filed a petition and bond for removal of this action with the United States District Court for the Western District of Oklahoma; accordingly, the cause was removed to that court.

The facts described *infra* were not in dispute; Santa Fe moved the district court to grant summary judgment in its favor. The district court granted this motion finding that there was no genuine dispute as to any material fact, and

concluding (1) that any claim against Santa Fe based directly or indirectly on Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, could not be maintained because there is no private right of action under that statute, and (2) that the court lacked jurisdiction to entertain plaintiff's breach of employment contract or wrongful discharge claim by virtue of the Railway Labor Act.

Petitioner appealed from the district court's decision to the United States Court of Appeals for the Tenth Circuit. After receiving the parties' briefs and hearing oral argument, the court of appeals affirmed the district court's judgment. In its opinion, reproduced at pp. 9-13 of the petition and published at 728 F.2d 414, the Tenth Circuit reasoned that petitioner's handicap discrimination claim was not cognizable under Section 503 of the Rehabilitation Act because that statute does not create a private right of action. The appellate court also ruled that the National Railroad Adjustment Board had exclusive jurisdiction over his breach of employment contract claim, whether or not petitioner had obtained membership in the union. Finally, the court held that since this action only involved a dispute between the employee and his employer, and the record disclosed no indication of collusion between the employer and union to effect petitioner's discharge, the case was not one in which the court could excuse petitioner's failure to resort to the remedial scheme established by the Railway Labor Act.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Tenth Circuit's Holding That Section 503 Confers No Private Right Of Action Is Consistent With Every Other Court Of Appeals Decision Addressing This Issue And Is In Accord With The Decisions Of This Court.

The Court should note at the outset that the Tenth Circuit's holding regarding Section 503 is consistent with those

reached by the nine other courts of appeals which have ruled on this matter. *See Howard* v. *Uniroyal, Inc.*, 719 F.2d 1552, 1555 n.5 (11th Cir. 1983); *Painter* v. *Horne Brothers, Inc.*, 710 F.2d 143 (4th Cir. 1983); *Beam* v. *Sun Shipbuilding and Dry Dock Co.*, 679 F.2d 1077 (3d Cir. 1982); *Fisher* v. *City of Tucson*, 663 F.2d 861 (9th Cir. 1981), *cert. denied*, U. S. , 103 S. Ct. 178 (1982); *Davis* v. *United Airlines, Inc.*, 662 F.2d 120 (2d Cir. 1981), *cert. denied*, 456 U.S. 965 (1982); *Simon* v. *St. Louis County, Mo.*, 656 F.2d 316 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982); *Simpson* v. *Reynolds Metals Co., Inc.*, 629 F.2d 1226 (7th Cir. 1980); *Rogers* v. *Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980); *Hoopes* v. *Equifax, Inc.*, 611 F.2d 134 (6th Cir. 1979).[3]

In any event, even if Section 503's failure to create a private right of action were not so well settled among the circuits, petitioner has cited no reasons for the court to grant certiorari in this instance. This Court has stated clearly that the extent to which implication of a private right of action would be of utility to many or would generally further purposes of the statute is irrelevant to the determination of whether the statute permits private enforcement of its terms in court. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 24 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 576-579 (1979). This Court, instead, has taught unequivocally that no unexpressed private right of action may be recognized in the absence of an indication that Congress intended to create one, *Touche Ross & Co.* v. *Redington, supra* at 576, 578 (1979); the requisite congressional intent is not to be lightly inferred. *Id.* at 578.

The fundamental requisites for implying a private right of action were set forth in *Cort* v. *Ash*, 442 U.S. 66 (1975).

[3] Significantly, the decisions in these circuits have overruled or implicitly rejected all of the district court rulings relied upon by petitioner (p. 5).

Here, the most compelling of the *Cort* factors, *i.e.*, whether the statute's language creates a right inherring in an identified class of individuals or merely imposes some duty, *Cannon* v. *University of Chicago*, 441 U.S. 677, 690 n.13 (1979), militates strongly against the implication of a private right of action. *See Touche Ross & Co.* v. *Redington*, *supra* at 576 (where a statute's language neither confers a right on a specific group nor prohibits any conduct, no private right of action may be implied).[4] The subsequent legislative history upon which petitioner relies falls far short of persuasively demonstrating a congressional intent different from the statute's language, *Transamerica Mortgage Advisors* v. *Lewis*, *supra* at 20.[5] Likewise, Section 503's express provision for an administrative remedial scheme also clearly undermines any inference that Section 503 could be made the basis for a private lawsuit. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra* at 19-20. *See also Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 93-94 (1981). The lower court committed no error in reaching this conclusion.

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[4] The language in Section 503 confers no right and forbids no conduct. It merely imposes a duly on federal agencies engaged in procurement activities to include a particular clause in their contracts with private entities and vests in the Department of Labor a means by which to enforce these contractual terms.

[5] It is noteworthy that petitioner has misquoted the Senate Report's contents upon which he relies (p. 5). Indeed, these remarks made by Senator Cranston during a floor debate contained no express reference to Section 503 whatsover. Instead, they were uttered in reference to all of Title V of the Rehabilitation Act which also includes Section 504, 29 U.S.C. § 794, a provision clearly providing for a private right of action, *see Consolidated Rail Corp.* v. *Darrone*, 465 U.S. , 104 S. Ct. 1248 (1984). Further, since the Senate Report related to an amendment to the Rehabilitation Act which succeeded the original Act's passage by five years, its contents could not be accorded the weight of contemporary legislative history. *Cannon* v. *University of Chicago*, 441 U.S. 677, 686 n.7 (1979).

Petitioner's continuing effort to execute an end run around the requirements of Section 503 by arguing that the appellate court at least should have permitted him to sue as a third party beneficiary to Santa Fe's Section 503 contracts (p. 6) is also unavailing. Petitioner cites no authority supporting this contention and could not. The Tenth Circuit properly recognized that petitioner's theory in this regard could not be reconciled with evident congressional intent to provide in Section 503 for an exclusive administrative enforcement mechanism. The court of appeals' conclusion also was in accord with that reached by all other courts ruling on the question. *See Hoopes* v. *Equifax, Inc.*, 611 F.2d 134, 135 (6th Cir. 1979); *Davis* v. *United Airlines, Inc.*, 33 FEP Cases 1119 (E.D.N.Y. 1983); *Coleman* v. *Noland Co.*, 21 FEP Cases 1248 (W.D. Va. 1980). *See also Howard* v. *Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983).

In short, it is clear that the instant petition is without merit insofar as its contentions regarding Section 503 are concerned.

II. Petitioner's Attempts To Circumvent The Bar To His Breach Of Contract Claim Imposed By The Railway Labor Act Present No Novel Issues And Their Disposition Below Is Not In Conflict With Decisions Of Other Circuits.

Without citing any authority supporting his position, petitioner takes issue with the lower courts' conclusion that his state law breach of contract claim was barred by the Railway Labor Act even though petitioner did not invoke the provisions of any collective bargaining agreements (pp. 6-7). This contention clearly presents no reason for the Court to exercise jurisdiction here. As the Tenth Circuit recognized, the manner in which petitioner framed his complaint could not obviate the collective bargaining agreements' relevance to and impact on the merits of his

contract claim. Indeed, provisions in these agreements explicitly addressed and justified petitioner's termination; these agreements could not be overlooked simply because petitioner chose to ignore them. Therefore, since resolution of plaintiff's breach of contract claim would inevitably involve the interpretation and application of collective bargaining agreements, the appellate court correctly relied upon this Court's decision in *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), in holding the claim was barred by Section 3 of the Railway Labor Act. Moreover, it is clear that the decision below comported with the rulings of other circuits in this respect. *See Minehart* v. *Louisville & Nashville R. Co.*, 731 F.2d 342 (6th Cir. 1984); *Landfried* v. *Terminal Railroad Assoc. of St. Louis*, 721 F.2d 254 (8th Cir. 1983); *Choate* v. *Louisville & Nashville R.*, 715 F.2d 369 (7th Cir. 1983); *Brown* v. *American Airlines, Inc.*, 593 F.2d 652 (5th Cir. 1979); *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *de la Rosa Sanchez* v. *Eastern Airlines, Inc.*, 574 F.2d 29 (1st Cir. 1978). Petitioner makes no effort to assert otherwise.[6] This Court has denied certiorari before in a case where a discharged railroad employee attempted to redress his discipline in court by pleading rights founded in state law but was rebuffed based on the Railway Labor Act. *Magnuson* v. *Burlington Northern*, 439 U.S. 930 (1978).

Petitioner's oblique reference to breach of duty of fair representation on his union's part is equally misplaced. The fact remains that he never attempted to sue the union in

[6] In connection with his breach of contract claims, petitioner also posits some theory to the effect that Santa Fe should be stopped from denying certain "directions" made by an agent of Santa Fe to petitioner (p. 6). Santa Fe is compelled to note that the record below contained no indication that any such representations were made to petitioner. In any event, petitioner's argument at most addresses the merits of his contract claim which, as the Tenth Circuit properly held, is barred by the Railway Labor Act.

this action, never mentioned the union in his complaint, never even suggested that any failure to represent him foreclosed his access to the arbitral forum, and never contended that the union and carrier engaged in anything approaching collusion in connection with his termination. Notably, this Court has excused otherwise mandatory resort to arbitration only where the union was a named defendant in the action and it was alleged that the union and carrier together effected the employee's discharge and thus rendered arbitration futile. *Glover* v. *St. Louis San Francisco Ry. Co.*, 393 U.S. 324, 329 (1969).

Further, petitioner's citation to *Kaschak* v. *Consolidated Rail Corp.*, 707 F.2d 902 (6th Cir. 1983), and *Schum* v. *South Buffalo Railway Co.*, 496 F.2d 328 (2d Cir. 1974) (p. 7), does not justify review of the Tenth Circuit's decision here. The results in these cases do not conflict with the holding below. In *Kaschak*, the court went to considerable length to explain that failure to resort to the Adjustment Board would be excused only where it was clearly alleged and proven that plaintiff reasonably relied on his union to present a union agreement grievance, that the union breached its duty of fair representation, and that this breach necessarily foreclosed the employee's access to arbitration. 707 F.2d at 913. Nothing of the sort is involved here. Indeed the record discloses no indication that petitioner relied on the union to process a grievance based on the union agreements and lost his opportunity to do so as a result. On the contrary, petitioner's affidavit indicates at most that the union informed him at the outset that it would not take up his case. At that point, petitioner could have and should have pursued his claim on his own. The union's conduct did not prevent him from doing so.[7] For similar reasons, reference to the

[7] Section 3 First (j) of the Railway Labor Act expressly confers on a railroad employee the right to present his grievances before the Adjustment Board without union representation. 45 U.S.C. § 153 First (j).

Second Circuit's decision in *Schum* v. *South Buffalo Ry. Co.*, 496 F.2d 328 (2d Cir. 1974), also fails to support the petition. There the grievant sought to redress rights based on collective bargaining agreements and sued the union complaining in several counts that it breached its duty of fair representation and in so doing fundamentally prevented him from exercising his arbitral rights under the Railway Labor Act. Not only does the record here fail to contain anything suggesting that the union deceived petitioner or otherwise foreclosed his access to arbitration, but petitioner has not even raised a claim against the union.

Despite his remarks regarding the union's conduct, petitioner reasserts his belief that the Railway Labor Act "is inapplicable because he never was a member of the union" (p. 7).[8] This theory is frivolous. As the record demonstrates beyond cavil, petitioner was employed by an interstate railroad carrier in a craft represented by a union which maintained collective bargaining agreements governing the conditions of employment of all members of this craft, whether they had joined the union or not, *Steele* v. *Louisville & N. R.*, 323 U.S. 192, 202-204 (1944). Thus, plaintiff's membership in a labor organization is wholly immaterial to the impact of the Railway Labor Act in this case.

Finally, petitioner attempts to rely on this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), presumably in support of his belief that the Railway Labor Act could not bar his breach of contract claim. Petitioner is once again mistaken in this respect. In *Alexander* the Court simply held that the availability of an arbitral

[8] Petitioner's contention in this respect is particularly perplexing in juxtaposition with his references to the union here since the union's duty of fair representation derives "wholly from the command of the [Railway Labor] Act." *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 199 (1944).

remedy under a non-rail labor agreement could not foreclose federal court jurisdiction explicitly provided for by a civil rights statute which unequivocally forbids discrimination based on protected status, whether or not involving breach of contract. Nothing like that is evident here. Petitioner's breach of contract claim invokes no separate federal statutory right of action and instead is inextricably intertwined with issues arising under the controlling collective bargaining agreements. Furthermore, the Railway Labor Act dictates the result complained of here, not merely some private agreement to arbitrate disputes as was the case in *Alexander* v. *Gardner-Denver*. Thus, it is clear that this decision is of no benefit to petitioner.

CONCLUSION

For ~~the~~ reasons heretofor stated, the petition for writ of certiorari should be denied.

Respectfully submitted.

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